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Does Judge Has Ex Officio Rights In determining *Mut'ah* and *Iddah*?

Sri Turatmiyah,* Muhammad Syaifuddin,* Annalisa Y,* Febrian,* and Arfianna Novera*

Abstract: The research aims to analyze the factors why the Religious Court judges do not use their ex officio rights in divorce lawsuits. In divorce case, the defendant who does not have any knowledge about divorce laws generally does not ask for *mut'ah* and *iddah* to the plaintiff. The question of this research is what factors caused the judges of Religious Court in South Sumatera, especially Palembang and Kayuagung do not exercise the ex officio rights in determining the quality of *mut'ah* and *iddah* due to divorce. This research used normative juridical method with *empirical juridical* through statute approach and case approach. The results show that during 2017 the Religious Court of Palembang used only once its ex officio right while the Religious Court of Kayuagung did it three times. The reasons are: the judges grant only the petition of the petitioner solely for the reason that the defendant party does not file a counter-claim, in which judge's reasoning is based on Article 178 paragraph (3) HIR/189 paragraph (3) RBG that the judge is prohibited from giving a verdict which is more than being petitioned known as the *ultra petitum partium*, the wife's side as the defendant never attended the hearing, the wife never gave an answer or response to the argument in the application of the plaintiff, the wife was not present in the verdict (*verstek*), the wife of *musyuz*, (does not do her duties as wife) the husband is economically insufficient, the wife does not want to demand the maintenance of *mut'ah and iddah*, the judge sees the causality. This study suggests that judges should exercise their ex officio rights and give advice as well sufficient information to the wife in order to fulfill her rights and interests as the result of the divorce.

Keywords: Divorce; Ex Officio Rights; Judge; *Mut'ah* and *Iddah*.

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INTRODUCTION

Marriage as stipulated in Article 1 The 1974 Law No. 1 on Marriage (UUP) is "an inner birth bond between a man and a woman as husband and wife with the aim of forming a

happy and eternal family or household based on the One God Almighty". But in the course of life, it has often been found that many couples broke their marriages either because of *talaq* divorce or divorce suit. In this regard, research needs to be carried out, especially in the jurisdiction of the Palembang and Kayuagung Religious Courts in South Sumatra Province. This is motivated by the high level of divorce cases in these Courts, as evidenced by the results of a research on the number of divorce cases in 2013-2016 as many as 9716 cases. Until August 2017 there were 524 cases which

consisted of 60% of divorce suit and 40% of *talaq* divorce.¹

From *talaq* divorce cases that has been decided in the jurisdiction of the Palembang and Kayuagung Religious Courts, it has been found that in their verdicts the judges did not use their ex officio rights to establish *mut'ah* and *iddah* to the wife even though the defendant did not sue the plaintiff, whereas the plaintiff is sufficiently materially capable. Ex officio rights in practice are still rarely used by some Religious Court judges in establishing *mut'ah* and *iddah* as a result of divorce due to *talaq* divorce. This also happened in the Palembang Religious Court because in 2016 and 2017, Palembang Religious Court judges had only once exercising their ex officio rights in dropping the *mut'ah* and *iddah* to the defendant, in this case the wife, as in the Decision No. 0564/Pdt.G/2017/PA.Plg dated 21 August 2017². The divorce case that occurred at the Kayuagung Religious Court until August 2017 were 800 (eight hundred) cases consisting of 588 (five hundred eighty eight) divorce suits and 204 (two hundred four) *talaq* divorces. In 2017 the judges of PA Kayuagung Religious Court had used their ex officio rights 3 (three) times as in the Decision Number 40/Pdt.G/2017/PA.KAG dated February 6, 2017, Decision Number 184/Pdt.G/2017/PA.KAG dated 27 March 2017 and the Decision Number 381/Pdt.G/2017/PA.KAG dated July 31, 2017³.

¹ Data was taken on September 8, 2017 at the Palembang Religious Court.

² Interview with Mr. Muhammad Lekat, Judge of Palembang Religious Court on September 8, 2017 in Palembang.

³ Interview with Mr. Andri Irawan, Judge of Kayuagung Religious Court on October 13, 2017 in Kayuagung.

In determining *mut'ah* and *iddah* as a result of divorce which not demanded by the wife as a defendant, the judges raise two opinions. Firstly, the judges do not punish the plaintiff for paying *mut'ah* and *iddah* to the defendant. Secondly, the ex officio judges punish the plaintiff to pay *mut'ah* and *iddah* to the defendant⁴.

Formulation of the Problem

From the description above, it should be stated that ex officio rights are always attached to the Judge because of his or her position as a state official and they can be practiced only in order to seek law for legal certainty. Based on this, it would be examined how the attitudes and viewpoints of the judges on the ex officio rights could protect the rights of children and ex-wives after the divorce. By basing the provisions of Article 41 letter c The 1974 Law No. 1 on Marriage, the judges have ex officio rights to impose penalties on husbands to provide a cost of livelihood to their wives due to divorce. This ex officio rights give the judges room to set *mut'ah* and *iddah* even though the defendant (wife) does not demand them.

Research Purpose

The purpose of this research is to analyze the attitudes of Religious Court judges in South Sumatra (especially the Palembang and Kayuagung Religious Courts) towards *mut'ah* and *iddah* which are not demanded by the defendant (the wife) due to divorce. Provision of Article 41 letter c UUP has stipulated that even though the wife does not demand her rights in the event of a divorce, the judge has ex officio rights to impose a

⁴ Muh. Irfan Husaeni, "Disparitas Putusan Hakim Pengadilan Agama Dalam Menetapkan Mut'ah dan Iddah," *Jurnal Varia Peradilan*, Year XXIX No. 342, Mei 2014, p94.

decision requiring the husband to fulfill his obligations to his wife.

RESEARCH METHODS

This research is a normative legal research which is doctrinal research. This research is describing, explaining and analyzing the problems in the decisions of Religious Court judges in the Palembang and Kayuagung jurisdictions who do not use *ex officio* rights in bringing down the *mut'ah* and *iddah* which are not demanded by the defendant or wife due to divorce. The study was complemented by empirical research to obtain legal materials relating to the factors underlying the judge not using *ex officio* rights in establishing *mut'ah* and *iddah* which were not proposed by the wife in the *petitum*. Normative studies are carried out to obtain secondary data in the form of primary, secondary and tertiary legal materials through literature search. Empirical studies were carried out in the field through interviews with Religious Court judges in the South Sumatra region including the Palembang and Kayuagung Religious Courts. The locations were chosen due to the divorce rates in both jurisdictions were high as described previously. Empirical research is carried out to obtain the answers about the background why the judges did not to use their *ex officio* rights in determining the *mut'ah* and *iddah* in the decision of divorce even though the defendant did not sue. Normatively, legal science has a typical *sui generis* work method in helping to solve legal problems faced by society. Legal science as a science of rules (norms) examines law as a rule or system of rules with dogmatic law⁵. Johnny Ibrahim states

⁵ A study that examines legal materials through literature search. Johny Ibrahim, *Teori dan*

that normative legal research is a scientific research procedure to find the truth based on the logic of legal knowledge from its normative side. The scientific logic of normative law is based on scientific discipline and the ways in which normative legal science works⁶.

Because the type of research used is the type of normative juridical research, the approach used is the statute approach, in this case, the 1974 Law No. 1 on Marriage, The 1975 Government Regulation of the Republic of Indonesia No. 9 of 1975 on the Implementation of the 1974 Law No. 1 on Marriage, Compilation of Islamic Law, The 2009 Law No. 50 on the Second Amendment to The 1989 Law No. 7 on Religious Courts) were referred. In addition to the statute approach, this research is also carried out with a philosophy approach and a case approach. The collected legal materials were then processed in a qualitative descriptive manner. From the results of the analysis, it is then integrated with the research material in the form of facts that occur in the field or community that are empirically descriptive. This analysis is the basis for deducting a conclusion deductively.

ANALYSIS AND DISCUSSION

Ex Officio Rights of Judge in Decision Making

An independent judicial power and/or freedom of the judge is an independent power and free from any influence even from the authority of the government. Unruly judges, deliberately harming justice seekers, applying the law arbitrarily or not being sensitive

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Metodologi Penelitian Hukum Normatif, Malang: Bayu Media Publishing, 2008, pp50-51.

⁶ Peter Mahmud Marzuki, *Penelitian Hukum*, Bandung: Kencana Prenada Media Group, 2005, p35.

to a phenomenon endangers the public and the State⁷.

Legally, the ex officio right means the authority of the judge to impose a decision on a case, after going through legal considerations which are then realized in the form of a decision that is considered a law and can be carried out voluntarily or by force. The judge is not a mouthpiece of the law, but the judge can develop the meaning of the article and paragraph for the purpose of resolving a case while still aiming to uphold justice and truth⁸. This means that the judge's decision must reflect a sense of justice and truth, at least acceptable to those who have an interest, in this case especially the ex-wife in divorce.

In connection with this, the provisions of Article 39 Paragraph (1) of the Company Law that: "Divorce can only be done before the Trial Court after the Court concerned tries and does not succeed in reconciling the two parties." Decision of divorce must be able to accommodate the interests of the parties related to the result of the divorce due to divorce (*mut'ah* and *iddah*). So, sociologically, the community will judge the Religious Court as an institution that provides legal protection and justice⁹. Actually, the parties do not want any divorce. Divorce in the case of *talaq* divorce, the initiative comes from the husband who files a lawsuit to the Religious Court which is deemed to occur and applies along with

the legal consequences from the moment the divorce is declared before the Religious Court hearing¹⁰.

The existence of problems among Religious Court judges in addressing *mut'ah* and *iddah* which are not demanded by the wife (the defendant) has been a discourse. Therefore, there is a disparity among Religious Court judges in exercising ex officio rights to the result of the divorce of *talaq* divorce which results in the wife's right to obtain *mut'ah* and *iddah*¹¹.

The role of the judge as a judicial power apparatus after the 1989 Law No. 7 on Religious Courts, in principle, none other than carrying out the judicial function in accordance with the provisions of the prevailing regulations. In order to carry out this judicial function, Religious Court judges must be fully aware that the principal task of the judge is to uphold the law and justice¹².

In the case of *talaq* divorce, it is often found that the defendant party or the wife (the party who is unfamiliar with the law) who has been barred by the husband or the plaintiff, does not demand *mut'ah* and *iddah*, even though the plaintiff is sufficiently and materially capable. There is a disparity in the decisions of Religious Court judges with various arguments. Some are set ex officio and some are not¹³. Ex officio rights in practice are still rarely used by some Religious Court judges in establishing *mut'ah* and *iddah* as a result of divorce due to *talaq* divorce. This is evidenced by the Decision No.

⁷ Bagir Manan, "Kejasaan Kehakiman Yang Merdeka," article in *Jurnal Varia Peradilan*, Year XXVII, No. 332, Juli 2013, pp. 13-14.

⁸ A. Razak Pellu, "Ex Officio dan Keberanian Hakim Mengambil Keputusan," *Jurnal Varia Peradilan*, Year XXIX, No. 339, Februari 2014, pp67-68.

⁹ Muh. Irfan Husaeni, Disparitas Putusan Hakim Pengadilan Agama Dalam Menetapkan Mut'ah dan Iddah, *Note 4*, p100.

¹⁰ M. Syaifuddin, Sri Turatmiyah, Annalisa Y, *Hukum Perceraian*, Jakarta: Sinar Grafika, 2013, p16.

¹¹ Muh. Irfan Husaeni, *Note 4*.

¹² Abdul Manan, *Penerapan Hukum Acara Perdata Di Lingkungan Peradilan Agama*, Jakarta: Kencana, 2008, p291.

¹³ Muh. Irfan Husaeni, *Note 4*, p97.

002/Pdt.G/2015/PA. Palembang dated June 27, 2015. Due to ex officio rights which were not implemented seriously and not carefully considered, the interests of the wife were not accommodated properly¹⁴.

In determining the result of the divorce due to *talaq* divorce towards *mut'ah* and *iddah* which are not demanded by the defendant, the judges raise two opinions. *Firstly*, the judge does not punish the plaintiff to pay for *mut'ah* and *iddah* to the defendant. *Secondly*, the ex officio judge punishes the plaintiff to pay *mut'ah* and *iddah* to the defendant. This is certainly an agreement that the judge's decision could either exercise the ex officio rights to punish the plaintiff to pay *mut'ah* and *iddah* to the defendant or those do not. Thus, the Religious Court judges in deciding divorce cases will not necessarily use ex officio rights in bringing down the *mut'ah* and *iddah* to the wife.

In connection with the authority of the ex officio judge, the independent judicial power and freedom of judges are the elements of the rule of law. In order to guarantee objectivity and fairness other than being obliged to decide according to law (unless there is a legal vacuum, the law is not clear, or contrary to justice) the judicial powers and the judges that make decision must be independent or free from all forms of influence or pressure from other powers. Judges are not only obliged to protect the public interest, but also protect individuals and minorities. The possibility of improperly and fairly denying the rights of individuals or minorities can only be protected, and the misuse of the majority can only be prevent-

ed if there is independence of the power of the judiciary and free judges¹⁵.

Marriage is a sacred institution because it is binding on religious law. Marriage is one of the most important parts of human life. Therefore, marital disputes must receive special attention from the state through the formation of a special court, namely the family court which is part of the Religious Courts which have handled many family matters including divorce. Therefore, Religious Court judges have an important position in the matter of giving a divorce decision, including in terms of bringing down the rights of the child and wife¹⁶.

The provisions of Article 38 of the Marriage Law stipulate that marriage breakups can occur due to death, divorce and judicial decisions. This arrangement means that the divorce must be preceded by a divorce lawsuit filed with the Court, after the court concerned tried and failed to reconcile the two parties. The breakup of marriage can be done through *talaq* or divorce. *Talaq* means the breakup of marriage between husband and wife (divorce). *Talaq* is the termination of the marital relationship at the request of the husband, while the divorce claims (*khulu'*) is the termination of the marital relationship which is preceded by a lawsuit from the wife¹⁷.

Article 4 letter b of the 2009 Law No. 48 on Judicial Power explains that the court assists justice seekers and strives to over-

¹⁴ A. Razak Pellu, *Note* 8, p67.

¹⁵ Bagir Manan, *Kekuasaan Kehakiman Yang Merdeka*, *Note* 7, p10.

¹⁶ Fyfal Ka'bah, "Permasalahan Perkawinan", *Jurnal Varia Peradilan*, Year XXII, No. 271, Juni 2008, p13

¹⁷ M. Syaifuddin and Sri Turatmiyah, "Perlindungan Hukum Terhadap Perempuan Dalam Gugat Cerai (Khulu') di Pengadilan Agama Palembang," *Jurnal Dinamika Hukum*, Volume 12, No. 2, Mei 2012, p249.

come all obstacles in order to achieve a simple, fast and low-cost trial. Regarding this matter, the judge in the court has *ex officio* authority or position rights. Judges in deciding a case can get out of the standard rules as long as there is an opinion in accordance with the Act¹⁸. In the case of divorce, the judge must consider matters relating to the rights of the child and wife in their decision. Because, for some women, not all of them understand the law, even they do not know the law at all, so in their reconciliation, the wives are found not to demand their rights in the event of a divorce. This is the basis for a judge to give a right and fair decision which certainly protects the parties.

Based on the results of research, in the jurisdiction of the Palembang Religious Court in 2016 there was a total of 842 cases, with details of 60% were filed by the wives and 40% by the husbands¹⁹. Divorce is a legal event that has certainly caused various problems, especially the rights of the wife and child. However, in reality, what happened in the Religious Courts at the moment is that some divorces are decided based on *ex officio* rights such as a *mut'ah* and *iddah* while some are not.

The *ex officio* right is the right of the judge who is attached to the position of the judiciary, where a judge can decide the case out of the standard rules as long as it has a logical reason according to the Law. The judge treats the same parties before the trial in order to get the fairest decision. The judge does not discriminate between people, all parties are given the same right to file a claim. This is in accordance with the provi-

sions of Article 58 of Law No. 7 of 1989 concerning Religious Courts, namely: Firstly, the Judge hears according to law by not discriminating against people. Secondly, the Court helps justice seekers and strives to overcome all obstacles to achieve a simple, fast and low-cost trial.

The judge as a judge made law and as an incarnation of the law, is obliged to uphold the values of justice that live in the midst of changes in society. Therefore, the judge has the authority to *contra legent* if the provisions of an article of the law are contrary to propriety and are not in accordance with the dynamics of conditions and situations that develop in the soul and awareness of the community²⁰.

The judge's *ex officio* rights should be given to the wife due to *talaq* divorce. This is based on, among others: Firstly, the provision of Article 149 letters a and b of Compilation of Islamic Law which regulates the result of marriage break up due to *talaq* divorce. When a marriage breaks up due to *talaq* divorce, the ex-husband is obliged to provide a *mut'ah* which is appropriate for his ex-wife during the *iddah* period unless his ex-wife has been subjected to *talaq ba'in* or *nusyuz*. Secondly, the provision of Article 152 of Compilation of Islamic Law in this article affirm that ex-wives are entitled to obtain *iddah* from their ex-husband except *nusyuz*. Thirdly, the principle of *equality before the law*, is an equality in law for each individual without exception, the plaintiff and the defendant have the same position in the trial.

¹⁸ Interview with Mr. Ahmad Musa Hasibuan, Judge of the Palembang Religious Court on September 7, 2017 in Palembang.

¹⁹ Data from the Palembang Religious Court was taken on September 7, 2017.

²⁰ Hartini, "Pengecualian Terhadap Penerapan Asas *Ultra Petitem Partium* Dalam Beracara Di Pengadilan Agama," article in *Jurnal Mimbar Hukum*, Volume 21, No. 2, Juni 2009, p387.

The Attitude of the Judge of the Religious Court Against *Mut'ah* and *Iddah* that the Defendant (the wife) Does Not Sue as a Result of Divorce

Conceptually, law enforcement lies in the activities of harmonizing the values described in the solid and manifested principles and act as a series of values to create, keep and maintain the peace of life. Law enforcement as a process is essentially a process of discretion which involves making decisions that are not strictly regulated by the rule of law. Based on this description, interference with law enforcement can occur if there is a discrepancy between values, rules and behavior patterns. Therefore law enforcement does not merely mean the implementation of legislation, but also as the implementation of a judge's decision²¹.

Law enforcement by the religious court that is needed by the community is a certainty and speed of service at an affordable cost. Likewise, in terms of divorce, there is still a cultural bias that makes judges place women as objects in the trial. As an object, the women do not have a balanced bargaining position with the men and tend not to be properly valued²². Public unrest often occurs in the divorce process, that whatever the problem and the consequences are the same, divorce.

Based on the results of research in the jurisdiction of the Palembang City Religious Court in 2016 there was a total of 842 cases, with details of 60% filed by the wives and

40% by the husbands²³. Divorce is a legal event that has certainly caused various problems, especially the rights of the wife and child. However, in reality, in the case of *talaq* divorce in the dispositive decision, the judges grant the petition by giving permission to the plaintiff to drop the *talaq* to the defendant in the Religious Court session, but not accompanied by a decision that punishes the plaintiff to pay *mut'ah* and *iddah* to the defendant²⁴.

Actually, marriage is a sacred promise for life.²⁵ But during its way, no one can be sure, the sacred vows made at the beginning of the marriage, forced to end and divorce is the best choice. The number of divorces based on the Religious Court data continues to increase every year. In Palembang itself, until November 2016 there were 2,532 cases received. Interestingly, this number was dominated by divorce claims from wives which reached 2129 cases and were far compared to *talaq* divorces from husbands in only 403 cases²⁶.

When compared to 2015, the data did increase. There were only 1,646 cases last year. The details were 361 *talaq* divorces and 1,285 divorce claims. It is known, based on the reason for filing a case, that there are several reasons for divorce in this city cov-

²¹ Mochamad Djoko, "Reformasi Birokrasi Peradilan Guna Meningkatkan Kepercayaan Masyarakat Terhadap Penegakan Hukum," *Jurnal Varia Peradilan*, Year XXVI, No. 304, March 2011, pp21-22.

²² Muhammad Isna Wahyudi, "Menjadi Hakim Sensitif Gender," *Jurnal Varia Peradilan*, Year XXVII, No. 317, Desember 2011, p51.

²³ Data from the Palembang Religious Court was taken on September 7, 2017.

²⁴ Based on the results of research in 2 (two) jurisdictions of the Palembang and Kayuagung Courts which were conducted in September-October 2017.

²⁵ Tobing, R. D., 2018, "Prevention of Child Marriage Age in the Perspective of Human Rights" *Sriwijaya Law Review*, 2(1), pp1-17.

²⁶ The results of the interview with Mr. Tulus, the Public Relations of Palembang Religious Court, that the divorce claims were more dominant than *talaq* divorce.

ering economic factors, domestic violence, third parties and others²⁷.

An expert of sociological jurisprudence from the State Islamic University (UIN) Raden Fatah Palembang, Dr. KA Bukhari Abdullah M. Hum. assessed that the high divorce rate is inseparable from the current conditions in which the access to law for women is opened. In the approach of sociological jurisprudence means women are legal literate, they understand their juridical considerations, so that they do not have to wait for men to decide on divorce. Today's society puts legal aspects forward more than kinship so that any decision taken either early or finally lies in the court²⁸.

Since the enactment of the 1974 Law No. 1 on Marriage (UUP) normatively the law has guaranteed a respectable and balanced position for woman as wife.²⁹ There is a significant change in male domination (husband) to woman (wife) in household life. The 1974 Law No. 1 on Marriage gives a right and a balanced position between a wife and a husband. General explanation and number 4 letter F of Law No. 1 of 1974 states: "The right and position of the wife is balanced with the rights and position of the husband, both in domestic life and in the community. So that everything in the household can be negotiated and decided jointly by the husband and wife.

Based on the provisions of Article 38 of the 1974 Law No. 1 on Marriage it is stated that: "Marriage can break up due to death, divorce and court decision". That is the principle in this Law to make it difficult to divorce, to allow divorce, there must be certain reasons and must be done in front of a court hearing. The right to declare divorce is no longer an absolute right of a husband, which can be done whenever he wants, but it must be done before a court of law for reasons justified by Law, and also with the husband's obligation to fulfill the wife's rights in the process of the divorce.

Basing the provisions of Article 38 of the 1974 Law No. 1 on Marriage, the wife, in obtaining her rights or not, depends very much on the judge's decision in divorce. Religious Court judges must certainly pay attention to the rights of the wife and children in making divorce decisions. There are five judge's policies to enforce the legislation, among others: *Firstly*, the judge simply moves the sound according to the word or sentence in the law against the facts that become evidence and the basis of the decision obtained in the trial. Judges are merely as "mouthpieces or mouths of legislation". *Secondly*, the judge must interpret the sound of the provisions in the legislation. *Thirdly*, both in the doctrine and practice, judges are permitted not to apply (override) laws and regulations (law). The judge does this if the application will be contrary to the general legal objectives and or contrary to justice, decency or public order or no longer provide benefit. *Fourthly*, the judges form the law. This tradition is known in the "common law", that the judge as a legal or law-making law (judge made law), is related to the history of the development of the system of legal rules which rests on the judge's case (case

²⁷ Note 25. 1

²⁸ Taken in *Wow, Selama 2016 Ada 1.830 Janda Baru di Palembang* quoted from <http://www.detiksumsel.com/wow-selama-2016-ada-1830-janda-baru-di-palembang#>[retrieved]

1 ptember17, 2017.

²⁹ Nurhidayatulloh, N., & Marlina, L., 2011. "Perkawinan di Bawah Umur Perspektif HAM-Studi Kasus di Desa Bulungihit, Labuhan Batu, Sumatra Utara," *Al-Mawarid Journal of Islamic Law*, 11(2).

law system). *Fifthly*, the judge states that the laws and regulations are invalid or do not have binding legal force, through the power of examining the law³⁰.

The above judge's policies are very much related to the wife's rights in the divorce case because of *talaq* divorce. In the process of divorce, the wife has rights, among others: *Firstly*, the balanced right of a husband and wife to file a divorce. *Secondly*, the right to submit a cumulation as stated in the 1989 Law No. 7 on Religious Courts that gives the right to the wife to file a divorce suit in a cumulation manner with the control of the child, the child's livelihood, the living of the wife and shared assets, or they can be filed after the divorce decision has permanent legal force. *Thirdly*, the right of *mut'ah*, and *iddah*³¹.

Based on the results of the study, the impact of the divorce verdict which only granted the *petitum* of the plaintiff without punishing the plaintiff for paying *mut'ah* and *iddah* to the defendant, even though it was legally justified, but in the perspective of justice, legal certainty and the principle of benefit it still leaves a problem. The problem arises when the defendant or the wife is present at the Religious Court with full expectation that her interests can be protected and she will get her rights in accordance with the applicable law, but she finally obtains only a divorce certificate. Therefore, Muhammad Lekat as a senior judge in the Palembang Religious Court used his ex officio rights in making decision to establish *mut'ah* and *id-*

dah, by basing the thought to fulfill the basic values of justice, the principle of benefit and the principle of legal certainty, especially to the wife so that her rights are fulfilled³².

In connection with the divorce decision, the provisions of Article 149 and Article 158 of Compilation of Islamic Law explicitly oblige the husband to give a proper *mut'ah* to his ex-wife, *nafkah*, *maskan* and *kiswah* during the *iddah* and pay off the dowry that is still owed. Religious Court judges in Palembang and Kayuagung do not use ex officio rights to give *mut'ah* and *iddah* to the wives because they were, among other things, never present at the trial, economically more sufficient than the husbands, and not present at the time the verdicts were read out (*verstek*)³³.

Based on the provisions of Article 31 of The 1974 Law No. 1 on Marriage, the rights and position of the wife are balanced with the rights and position of the husband in domestic life. Because the differences between men and women cannot be said to be natural, so in essence it can be said that "men and women are different but they should not be discriminated one another". Gender equality is then needed, a condition that is fair to women and men through a cultural and structural process that stops actualization barriers for the parties because their sexes experience obstacles³⁴. Likewise in divorce, ex-wives required gender justice

³⁰ Bagir Manan, "Konsekuensi Yuridis Keputusan Menteri Yang Dinyatakan Tidak Berlaku Lagi," article in *Jurnal Varia Peradilan*, Year XXIV, 1 p, 286, September 2009, pp8-12.

³¹ Purwosusilo, *Hak-Hak Istri Dalam Proses Perceraian*, article in <http://www.pa-karawang.go.id/artikel/baca/21> retrieved on April 6, 2017.

³² The results of the interview with Mr. Muhammad Lekat, Palembang Religious Court judge who only once using his ex officio rights. The interview was conducted on September 7, 2017 at the Palembang Religious Court.

³³ Note 30.

³⁴ Kunthi Tridewiyanti, "Kesetaraan dan Keadilan Gender Di Bidang Politik "Pentingnya Partisipasi dan Keterwakilan Perempuan di Legislatif," article in *Jurnal Legislasi Indonesia*, Volume 1, No. 1, April 2012, p77.

in obtaining their rights even though they were not required by the defendant (the wife's side) in reconciliation lawsuit.

In addition to the above, the reason why the judges do not use their *ex officio* rights because it is based on the provisions of Article 178 Paragraph (3) of HIR / 189 Paragraph (3) of RBg that judges are prohibited from giving decisions about matters that are not petitioned or give more than what is requested because it is *ultra petitum partium* which prohibits judges from granting more than what is charged. This principle requires that the judge's actions must be in accordance with the law (suit with the law) and must recognize the principle of rule of law. It is possible that there is an internal discretion of judges in certain Religious Courts which not to dispute *mut'ah* and *iddah* due to *talaq* divorce, unless the wife demands it³⁵.

Based on the results of the research towards the Palembang Religious Court judges and a description in the discussion above, it is noted that the judges do not use *ex officio* rights in the divorce decision since it is regulated in the Decision No. 0564/Pdt.G/2017/PA.Plg dated May 15, 2017. Previously, Palembang Religious Court judges used *ex officio* rights in determining the *mut'ah* and *iddah* in the Decision No. 0499/Pdt.G/2015/PA.Plg dated May 4, 2015³⁶.

The judge as the creator or legal inventor (judge made law) stays on two stages, namely the stage before decision making (*ex ante*) and the stage after decision making (*ex post*). The discovery of the law after the decision making is called "legitimacy" which

is related to the justification of the decision that has been taken³⁷. The factors why the judges of the Religious Court in the jurisdiction of South Sumatra, especially the Palembang and Kayuagung Religious Courts do not use *ex officio* rights in determining *mut'ah* and *iddah* for the wife (the defendant) are: *Firstly*, the defendant (wife) does not know that the ex-wife has the right to *mut'ah* and *iddah* in the *talaq* divorce. *Secondly*, the wife cannot prove the certificate of childbirth, and other evidence that can be taken into consideration by the judge in determining *mut'ah* and *iddah* livelihoods. *Thirdly*, the defendant did not demand because her desire was only to divorce with her husband. *Fourthly*, because the defendant party (wife) is a person who economically sufficient compared to the husband, therefore she does not ask for *mut'ah* and *iddah*. *Fifthly*, the defendant (the wife's side) is *nusyuz* and does not behave well. *Sixthly*, in the case of absence of the defendant in the court (*verstek*), the judge does not use *ex officio* rights in bringing down the *mut'ah* and *iddah*. *Seventhly*, the judge looks at the causality from the case filed³⁸.

³⁵ Muh. Irfan Husaeni, *Note*. 4, pp 96-97.

³⁶ Interview with Mr. Muhammad Lekat, Judge of Palembang Religious Court on September 8, 2017 in Palembang.

³⁷ Ahmad Zaenal Fanani, "Hermeneutika Hukum Sebagai Metode Pemenuhan Hukum Dalam Putusan Hakim," article in *Jurnal Varia Peradilan*, No. 297, Year XXV, August 2010, p61.

³⁸ Interview with Mr Hasibuan and Mr. Sunardi, judges of Palembang Religious Court on September 7, 2017 in Palembang and an interview with Mr. Andri, judge of Kayuagung Religious Court April 10, 2017 in Kayuagung. *Mut'ah* is a gift in the form of money or goods from a husband to a wife who is divorced, as an entertainer or pleasing to the ex-wife's heart. The judge will determine according to the appropriateness and fairness of the plaintiff.

CONCLUSION

Based on the discussion above, it is concluded that the judges of Palembang and Kayugung Religious Courts did not use *ex officio* rights in determining *mut'ah* and *iddah* as a result of *talaq* divorce due to "if the judge has legal considerations" that the ex-wife or the defendant was volunteered not to be given the right of *mut'ah* and *iddah*, *nusyuz*'s wife, and the husband was economically insufficient. In the case of ex-wives or defendants did not submit demands for *mut'ah* and *iddah*, the judges' attitudes: *Firstly*, using *ex officio* rights, as stipulated in the 1974 Law No. 1 on Marriage that the Religious Courts have been given the authority to uphold their dignity and protect the rights of the wives by requiring their husbands (plaintiffs) to provide a living cost and/or determine a duty for the ex-wife. *Secondly*, the judges provide sufficient advices and information to the parties. Providing advices and information to the parties does not violate the principle of a passive judge, this is done with the aim that the law is carried out properly so as to achieve the principle of justice, legal certainty and benefits. The judge has the right to give advice to both parties wisely in solving the problems. The judge as an independent judicial power conductstrial to enforce law and justice based on Pancasila for the implementation of the rule of law. *Thirdly*, the judge opens the reconciliation room. This is done by giving the wife the opportunity to make a reconciliation claim. The judge gives advice, information and shows the law to the wife (defendant) for her rights, in the meaning that the judge reflects the basic value of justice.

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